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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 643

C. H. BUNN,

Appellant,

vs.

STATE OF NORTH CAROLINA

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

STATEMENT AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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Counsel for Appellee.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 643

STATE OF NORTH CAROLINA

vs.

C. H. BUNN

STATEMENT AGAINST JURISDICTION

The State of North Carolina, the appellee in this appeal from the Supreme Court of North Carolina, files herewith a statement of matters and grounds making against jurisdiction of this Court as provided in Rule 12 of this Court.

The appellant relies entirely upon one asserted violation of the Constitution of the United States by the Ordinance Number 845 of the City of Durham, North Carolina, which prohibits the handling of poisonous reptiles by picking them up with the bare hands or holding them against any exposed part of the human body and otherwise handling such reptiles in an exposed way, or inviting, suggesting, suffering or permitting or aiding others to do so, and declaring such acts to be a public nuisance. The appellant contends that the enforcement of the ordinance prevents

him from exercising the right of religious liberty guaranteed by the First and Fourteenth Amendment to the Constitution of the United States. The defendant concedes that unless the ordinance impinges on his constitutional guarantee of freedom of religious worship, he is in defiance of its terms.

The appellee submits that there are no substantial grounds upon which this Court should assert its jurisdiction.

The law to be applied in this case is so well settled that it cannot be the subject of any serious debate. The appellant, in his argument below, cited decisions of this Court upon which we equally relied. The cases cited by the appellant in his Statement of Jurisdiction on his appeal to this Court are not authority for his position for the reason that they do not relate to ordinances or statutes which have been enacted in the interest of the health, safety, good order and well being of society.

All of the cases hold that, even though the Constitution guarantees the right of all people to entertain any religious belief which they so desire, nevertheless, in the exercise of such belief they may not engage in practices which are detrimental to the health, safety, good order and well being of society.

In *Kirk* v. *Commonwealth of Virginia,* 186 Va. 839, 44 S.E. (2d) 409 (1947), Kirk was convicted of involuntary manslaughter arising out of the death of his wife which was caused by the bite of a poisonous snake held by him during a church ceremony under circumstances similar to the ones in the instant case.

For errors committed by the Trial Judge to the jury in his charge on manslaughter, a new trial was granted; but in discussing the constitutional question of religious liberty raised in the case, the Court said:

> "[3] The court properly instructed the jury that 'while the law cannot interfere with a person's religious

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belief or opinion, this is no excuse for an illegal act made criminal by the law of the land, even though such act is based on conscientious religious belief.'

"As said by Chief Justice Waite in *Reynolds* v. *United States*, 98 U. S. 145, 25 L. Ed. 244, 250: 'Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.' See also *Jones* v. *City of Opelika*, 316 U. S. 584, 62 S. Ct. 1231, 86 L. Ed. 1691, 141 A.L.R. 514."

In *Lawson* v. *Commonwealth of Kentucky*, 291 Ky. 437, 164 S.W. (2d) 972 (1942), Lawson and others were convicted of handling and displaying snakes during a religious ceremony in violation of a State statute prohibiting the same (Chapter 60 of the Acts of the 1940 General Assembly, Kentucky Statute, Section 1267a-1).

In upholding this conviction, the Supreme Court of Kentucky said (quoting from the syllabus):

"The federal constitution does not preclude a state from enacting a law prohibiting the practice of a religious rite which endangers the lives, health or safety of the participants or other persons. Ky. St., sec. 1267a-1; U.S.C.A. Const. art. 6; Amends. 1, 14."

* * * * * * *

"The purpose of the framers of federal and state constitutional provisions separating church and state and guaranteeing 'religious liberty' was to obtain relief from laws making almost every deviation from established practice or faith a crime, and not to secure the right, under the guise of religious freedom, to jeopardize the safety, health or welfare of their fellow-

man. Const. sec. 5; U.S.C.A. Const. art. 6; Amends. 1, 14."

In *Reynolds* v. *United States*, 98 U. S. 163, 25 L. Ed. 244 (1879), the defendant was convicted of bigamy in violation of a Federal statute prohibiting polygamous marriages in a territory of the United States. The defense was that, on account of his religious belief (Mormon), the defendant was, under the doctrine of his church, in duty bound to practice polygamy, and for his failure to do so he would be punished and the penalty would be "damnation in the life to come."

In upholding the conviction and discussing the constitutional guarantee of the right of religious freedom, the Court said:

> "In our opinion the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

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"So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

In *Davis* v. *Beason*, 133 U. S. 342, 33 L. Ed. 637 (1890), Davis was indicted, with other persons named, for conspiracy to unlawfully pervert and obstruct the administration of the laws of the Territory of Idaho in that they unlawfully procured themselves to be admitted to registration as electors in said County by appearing before the respective registrars of the election precincts in which they resided, and taking an oath to the effect that, among other things, they were not bigamists or polygamists nor were they members of any organization or association which taught, advised, or counseled its members or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law as a duty arising or resulting from membership in such organization or association.

In upholding the conviction, the Court said:

". . . Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel

their practice is to aid in their commission, and
teaching and counseling are themselves criminal
proper subjects of punishment, as aiding and abe
crime are in all other cases."

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"It is assumed by counsel of the petitioner tha
cause no mode of worship can be established or reli
tenets enforced in this country, therefore any for
worship may be followed and any tenets, howeve
structive of society, may be held and advocate
asserted to be a part of the religious doctrines of
advocating and practicing them. But nothing is fu
from the truth. Whilst legislation for the estal
ment of a religion is forbidden, and its free exe
permitted, it does not follow that everything w
may be so called can be tolerated. Crime is not the
odious because sanctioned by what any particular
may designate as religion."

In *The Late Corporation of the Church of Jesus C*
of Latter-Day Saints v. *United States*, 136 U. S. 49,
Ed. 478 (1890), the Supreme Court, in discussing the
tion of religious freedom, said:

"One pretense for this obstinate course is, that
belief in the practice of polygamy, or in the rig
indulge in it, is a religious belief, and therefore u
the protection of the constitutional guaranty o
ligious freedom. This is altogether a sophistical
No doubt the Thugs of India imagined that their
in the right of assassination was a religious b
but their thinking so did not make it so. The pra
of suttee by the Hindu widows may have sprung
a supposed religious conviction. The offering of hu
sacrifices by our own ancestors in Britain was no
sanctioned by an equally conscientious impulse.
no one, on that account, would hesitate to brand
practices, now, as crimes against society, and obno
to condemnation and punishment by the civil au
ity."

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The case of *Prince* v. *Commonwealth of Massachusetts*, 321 U. S. 158, 88 L. Ed. 645 (1944), is an appeal by Sarah Prince from convictions of the Massachusetts child labor laws which prohibit boys under twelve and girls under eighteen years of age selling magazines or other merchandise on any street or other public place in the State. Here again the question of religious liberty was raised by one of Jehovah's Witnesses. In discussing the subject of parental control over children, which includes religious views and the right of the parent to control the child's course of conduct on religion, the Supreme Court said:

> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds* v. *United States*, 98 U. S. 145, 28 L. Ed. 244; *Davis* v. *Beason*, 133 U. S. 333, 33 L. Ed. 657, 10 S. Ct. 299. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. *People* v. *Pierson*, 176 N. Y. 201, 68 N.E. 243, 63 LRA 187, 98 Am. St. Rep. 666. The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction."

In *Cantwell* v. *Connecticut*, 310 U. S. 396, 84 L. Ed. 1213 (1940), the Supreme Court, in discussing the question of religious freedom, said:

> ". . . The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."
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> • • • • • • •
>
> ". . . When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to present or punish is obvious. . . ."

The defendants rely upon *Murdock* v. *Pennsylvania*, 319 U. S. 105, 87 L. Ed. 1292, and *Martin* v. *Struthers*, 319 U. S. 141, 87 L. Ed. 1313, in support of their position.

Both of these cases deal with the activities of Jehovah's Witnesses.

In the *Murdock* case, the Supreme Court held invalid a taxing ordinance which levied a tax upon persons solicit-

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ing orders for goods, wares or merchandise of any kind, and distributing literature expounding the views of their religious belief. The Court held that the imposition of the license tax in question, when applied to people engaged in such activity from house to house, was an invasion of the rights of freedom of religion and of speech and press. In this case, no question was raised as to illegality of the manner in which the activity was carried on. As to this, the Court said:

> "The integrity of this conduct or behavior as a religious practice has not been challenged. Nor do we have presented any question as to the sincerity of petitioners in their religious beliefs and practices, however misguided they may be thought to be. Moreover, we do not intimate or suggest in respecting their sincerity that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. Reynolds *v.* United States, 98 U. S. 145, 161-167, 25 L. ed. 244, 248-250, and Davis *v.* Beason, 133 U. S. 333, 33 L. ed. 637, 10 S. Ct. 299, denied any such claim to the practice of polygamy and bigamy. Other claims may well arise which deserve the same fate. We only hold that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations in an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types. The manner in which it is practiced at times gives rise to special problems with which the police power of the states is competent to deal. See for example Cox *v.* New Hampshire, 312 U. S. 569, 85 L. ed. 1049, 61 S. Ct. 762, 133 ALR 1396, and Chaplinsky *v.* New Hampshire, 315 U. S. 568, 86 L. ed. 1031, 62 S. Ct. 766. But that merely illustrates that the rights with which we are dealing are not absolutes. Schneider *v.* Irvington, 308 U. S. 147, 160, 161, 84 L. ed. 155, 164, 165, 60 S. Ct. 146. We are concerned, however, in these cases merely with one narrow issue. There is presented for

decision no question whatsoever concerning punishment for any alleged unlawful acts during the solicitation. Nor is there involved here any question as to the validity of a registration system for colporteurs and other solicitors. The cases present a single issue—the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities."

In the *Martin* case, the Court again struck down a municipal ordinance, making it unlawful for anyone distributing literature to ring a doorbell or otherwise summon the inmates of any residence to the door for the purpose of receiving such literature, as violative of the right of freedom of speech and press as well as religion. As in the *Murdock* case, no question was raised in this case as to the illegality of the manner in which the activity was carried on.

This principle is recognized by the Supreme Court of North Carolina in State *v.* Beal, 199 N. C. 278-302, where Chief Justice Stacy, writing for the Court, said:

"There are those who feel more deeply over religious matters than they do about secular things. It would be almost unbelievable, if history did not record the tragic fact, that men have gone to war and cut each other's throats because they could not agree as to what was to become of them after their throats were cut. Many sins have been committed in the name of religion. Alas! the spirit of proscription is never kind. It is the unhappy quality of religious disputes that they are always bitter. For some reason, too deep to fathom, men contend more furiously over the road to heaven, which they cannot see, than over their visible walks on earth; and it is with these visible walks on earth alone that we are concerned in the trial of causes. In recognition of this fact and because 'our civil rights have no dependence on our religious opinions,' as pro-

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claimed by Thomas Jefferson and embodied in the Virginia statute of religious freedom, it was provided in the North Carolina Constitution of 1868, that 'no human authority should, in any case whatever, control or interfere with the rights of conscience.' "

The Supreme Court of North Carolina, in a carefully stated opinion (229 N. C. 734, Advanced Sheet, Number 10), succinctly stated the law in this country with respect to the phase of religious freedom raised in this case. On page 735 of the opinion in this case, Mr. Chief Justice Stacy, writing for the Court, said:

"The defendants say, however, that the handling of poisonous reptiles without harm to themselves or others is the power which they are commanded to show to the people, and to extract the venom of the reptiles renders them useless for such purpose. It was suggested on the argument by the defendants in person that in all probability we would not understand this. Even so, as a matter of law the case comes to a very simple question: Which is superior, the public safety or the defendants' religious practice? The authorities are at one in holding that the safety of the public comes first. Kirk *v.* Com. of Virginia, 186 Va. 839, 44 S. E. (2) 409; Lawson *v.* Com. of Kentucky, 291 Ky. 437, 164 S. W. (2) 972; Reynolds *v.* United States, 98 U. S. 163, 25 L. Ed. 244; Latter-Day Saints *v.* United States, 136 U. S. 49, 34 L. Ed. 478."

Motion to Dismiss or Affirm

For the reasons set out above, the appellee submits that the questions on which the decision of this case depends are so unsubstantial as not to need further argument. All of the constitutional questions raised by this appeal have been thoroughly argued, examined and decided in the Supreme Court of North Carolina. There are, therefore, no substantial grounds upon which this Court should assert

its jurisdiction or should find that substantial Federal questions are at issue.

Therefore, the appellee respectfully moves the Court that this appeal be dismissed or affirmed.

HARRY MCMULLAN,
Attorney General of North Carolina.
T. W. BRUTON,
Assistant Attorney General.

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APPENDIX

AN ORDINANCE DECLARING THE HANDLING, OR AIDING, INVITING, SUGGESTING OR PERMITTING OTHERS TO HANDLE, POISONOUS REPTILES, TO BE A PUBLIC NUISANCE, AND PROVIDING FOR THE SUMMARY ABATEMENT OF SAME; MAKING CERTAIN PRACTICES OR ACTS WITH POISONOUS REPTILES UNLAWFUL; PRESCRIBING LAWFUL WAY TO KEEP POISONOUS REPTILES; AND PRESCRIBING PUNISHMENT FOR VIOLATION.

Be it ordained by the City Council of the City of Durham:

Section 1. The physical contact by human beings with venomous reptiles by such human beings knowingly and intentionally handling reptiles of a poisonous species or variety, whose venom has not been removed, by picking them up with bare hands, holding them against exposed parts of the human body, head, or any other exposed part of the human anatomy, and otherwise intentionally handling them in an exposed way, or inviting, suggesting, exhorting, challenging, or otherwise suffering or permitting or aiding others to do so, is dangerous and is inimical and detrimental to public health, safety, and welfare, and is hereby declared to be a public nuisance, which may be summarily abated in the manner hereinafter prescribed.

Sec. 2. It shall be unlawful for any person to own, possess, keep, use, lend out, hire, or traffic in any reptile of a poisonous species or variety, whose venom has not been completely removed, unless such reptile is at all times kept securely in a box, cage, or other safe container or device in which there are no openings of sufficient size through which such reptile can crawl, or through which such reptile can bite or inject its venom into any human being who may be at or near such container or device in which such reptile is contained.

Sec. 3. It shall be unlawful for any person to knowingly or intentionally handle any reptile of a poisonous species or variety, whose venom has not been completely removed, by picking up or holding such reptile in bare hands, or

by placing or holding such reptile against the exposed part of his, her or another's body, head, or any other exposed part of the human anatomy, or by placing his or her own, or another's, hand or any other part of the human anatomy in any cage, box, or other device or container wherein such reptile is known or suspected to be; and it shall likewise be unlawful for any owner, lessee, bailor, bailee, possessor, trainer, or keeper of any such poisonous reptile to knowingly permit, allow, suggest, entice, invite, challenge, intimidate, bait, exhort, or otherwise suffer or aid any person to pick up or handle any such poisonous reptile in any manner or way described and defined hereinabove and hereafter in this ordinance.

Sec. 4. In any case in which the police have reasonable grounds to believe that any of the provisions of this ordinance are being, or are about to be, violated, it shall be the duty of the police, and they are hereby fully authorized, empowered, and directed to immediately investigate such violation, or impending violation, and to immediately seize and take into their possession the reptile or reptiles involved in such violation; and the said police are hereby authorized and directed to deliver such reptiles to the proper authorities of the Durham City and County Board of Health for the immediate examination and tests of such reptiles by such authorities, or other expert authorities to which they refer the same, for the purpose of ascertaining whether or not said reptiles contain venom and are poisonous; and if said health authorities, or other expert authorities designated by them to make such examinations and tests, find that the venom has not been removed from said reptiles and that said reptiles are still venomous and poisonous it shall be the duty of the police, and they are hereby instructed, authorized, and directed to forthwith destroy such reptiles; but if said health authorities, or other expert authorities by them designated to make such examinations and tests, find that the venom has been completely removed, or that, for any other reason, the reptiles are not poisonous or venomous and cannot be and are not harmful to human safety, health, or welfare, then and in such event it shall be the duty of the police and they are

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hereby so instructed, to return the said reptiles to the one from whom they were seized.

Sec. 5. In the event the examinations and tests made by the health or other expert authorities, as provided hereinabove, show that the venom has not been completely removed and that such reptile is venomous and poisonous it shall be the duty of the police, in addition to destroying such reptile as required in the next preceding section, to also arrest all persons violating any of the provisions of this ordinance.

Sec. 6. Any person violating any of the provisions of this ordinance shall, upon conviction, be fined or imprisoned as provided in section 14-4 of the General Statutes of North Carolina.

Sec. 7. If any paragraph, clause, or section of this ordinance should be declared by any court of competent jurisdiction to be invalid for any reason, such invalidity of such paragraph, clause or section shall not affect the validity of the remaining provisions of this ordinance, it being hereby declared that it is the legislative intent that such remaining portions would have been enacted notwithstanding the validity of those portions declared to be invalid.

Sec. 8. This ordinance shall be in full force and effect from and after its passage.